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A STUDY OF THE MARRIAGE CANONS

Their Relation to the Christian Faith

with Special Reference to the Episcopal Church

A Thesis Presented to the Faculty of the

Episcopal Theological School

in partial fulfillment of the requirements for the degree

of Bachelor of Divinity

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Preface

In the preparation of this thesis I have read journal articles to determine the most recent thinking on marriage and the marriage canons. I have also read many books on marriage and the marriage canons, and since there is a wealth of material in many books on marriage, I have not attempted to read all of them. Since there are so many books in this area, I have done no little reading but have tried to keep within the scope and size of this thesis. I have also had many discussions with my theological peers and a few lawyer friends who have helped me become clearer in my approach and methodology.

The course labeled "Marriage and Family Counseling" in the curriculum of the Episcopal Theological School was a very helpful orientation to the problems presented by the marriage canons. Another course labeled "Canon Law" was also very helpful since it delineated many of the fine points of the marriage canons. I am also indebted to a friend and recent graduate of the Episcopal Theological School who pointed out the ambiguities and problems of the marriage canons to me in the first place.

A short history of marriage laws that have come into being in the history of the Church will be developed in chapter one. Various legal influences will be seen as various approaches of marriage law are seen in their historical perspective. A short history of the present marriage canons of the Protestant

Episcopal Church will also be developed showing not only the accumulation of laws on marriage but certain legal and political influences.

In the second chapter of the thesis I will outline some of the problems ordinary persons have in regard to remarriage and to marriage itself. The first consideration is to ask, with what are we dealing? When persons with problems in the area of marriage come to the Christian minister, he should not be primarily concerned with the canons, but he should want to know the elements going into each particular pastoral problem. The second consideration is how the marriage canons may treat the particular case with which the Christian minister may be involved. Whether or not a particular marital problem presents a contractual or personal problem, the Christian minister should still approach the problem from a pastoral point of view. It is axiomatic that all marital problems relating to divorce and remarriage will have certain contractual problems which would serve to show that contractual and personal elements are inextricably bound together by the very nature of marriage.

In chapter three I will develop a theology of marriage taking into account not only the social character of marriage but also the ontological nature as well. What are we dealing with when we think of marriage? To be sure, we think of many things, and it is these various and complex elements of marriage I want to place into a coherent theology of marriage. The nature of the

Gospel is, in my estimation, the very basis of Christian marriage. The basis for marriage is certainly more encompassing than the few short passages of Scripture alluding to marriage. As a base for marriage, the Gospel is certainly more broad than a few proof texts geared for an ancient culture. It is not that I devalue the few scriptural allusions to marriage, but in themselves they are inadequate for the complexities of modern culture. After a theology of marriage is developed, then we may see whether or not the marriage canons need revision, that is, need to be clearer in intention and language.

In chapter four I will attempt to show whether or not there are discrepancies between the Gospel and the marriage canons. Here I will develop further the disparities and points of contact between a theology of marriage and the marriage canons in the context of the Christian Faith.

I hope to set forth a clearer canonical directive in matters of marriage and remarriage in chapter five. I will draw on some of the conclusions of the preceding chapters to show where clearer language and clearer methods of dealing with this very complex area are needed. The preceding chapters will be summarized and general proposals will be made in the concluding chapter.

I am concerned with setting forth a better canonical directive in this thesis. The chapters mentioned above will lead

into definite proposals but at the same time show where the Church is not amiss in its present approach. It is clear from reading canons sixteen, seventeen, and eighteen that the language and procedure of law respecting marriage problems is far from precise at various points. Perhaps exactitude is not called for but, rather, more clearly discernible guidelines. Since the marriage canons are nearly the last place of overt lay participation with the canons, it seems necessary that the Church should work out marriage canons able to express theological demands while recognizing human failure. I am not, however, primarily interested in divorce or nullity per se. Rather, I am interested in seeing the canons make room for better avenues of procedure for remarriage after divorce and nullity.

Some general things must be recognized in proposing new or clearer marriage canons. Simply to state or hold to an Ideal that purports to be Christian because it has scriptural backing and is reputed to be divine law does not necessarily set forth the entire truth. On the other hand, simply to allow the culture to dictate certain procedures that betray something sub-Christian is not the best possible approach either. I see as the approach to the complex problems of marriage and remarriage looking first at the human condition and then entering into dialogue with the society and culture. This outlook is from an anthropology that

recognizes human failure but does not, however, relinquish the demands of the Gospel made on each individual in marital relationships. The problems of persons in marital trouble relating to remarriage and the conterminous canonical directives serve as the beginning point.

I

History and Development of Marriage Laws

Only recently have the marriage canons of the Episcopal Church in the United States come to be as they are now stated in the present Canons. Behind this very recent legislation lies a two-thousand-year-old history of canonical legislation and theological thinking relating to marriage and the problems connected with it. From a study of the history of the Church, it is apparent that from the very beginning the Church has been concerned with marriage, divorce, and remarriage. Indeed, the basic problem generally resides in the question of remarriage.

Very early in the primitive church St. Paul had written a few words about divorce and remarriage. In the seventh chapter of his first Corinthian letter, Paul expresses an unsystematic pastoral approach. "He quite decidedly prohibits divorce, which of course had been forbidden by a saying of the Lord (7:10ff, 39). In a case of mixed marriage, a dissolution should under no circumstances originate with the Christian partner, but no compulsion should be used if the unbelieving partner chooses to go. A new marriage should be contracted 'in the Lord!'"¹ Paul, however, goes on to say that Christians should be happy in whatever state they have been placed by God. On the other hand, he wants to allow dissolution of marriage in certain cases and seems to have left the

door open for further interpretation and possible room for principle rather than legality. But "in his wholly unsystematic way, he foreshadows a settled system of Christian ethics and of statutory canon law."²

The Synoptic Gospels present a different picture where one can begin to see an insipient legalism taking shape. The Scriptural passages referring to divorce and remarriage in the Synoptic Gospels have only one variation. Mark 10:11 and Luke 16:18 say little about divorce but focus their attention on remarriage. Both these passages seem to allow for divorce but, of course, are very strict at the point of remarriage. Matthew, however, says divorce is only permitted on grounds of unchastity, and remarriage is not permitted at all. There seems to be a disparity between what Paul is willing to write on these matters and what the Synoptics are willing to say. A shift seems to have occurred from principle to legality, especially from Paul to the Synoptics. The general problem within the Synoptics is not divorce but remarriage. Mark and Luke are willing to have Jesus allow divorce but not remarriage, and the problem of divorce in the Synoptics comes only in Matthew where unchastity is permitted as the only ground for divorce. Paul, however, in the first Corinthian Letter, remains ambiguous, for he seems to say that divorce is not permitted but also that

remarriage is possible and at times not possible. Perhaps Paul is practicing a situational ethic.

Matthew seems to be more legalistic on the matter of divorce than any other New Testament writer. Not that divorce is not allowed elsewhere in the New Testament, but it is Matthew who sees only one ground for a divorce action, and it can be deduced that other New Testament writers permitted divorce for numerous reasons not given in their writings. Matthew presents unchastity as the only ground for divorce. "It was not some later antinomian or erastian who glossed the text with these two clauses: (Matt. 5:32, 19:9), it was the author himself, or the 'school' of Christian scribes to which he belonged, who gave the sayings their present form."³ This "school" is really a strict school and seems to be out of keeping with the general nature of Jesus' teachings. Mark and Luke are primarily concerned with remarriage and not with divorce unless measures against remarriage were supposed to work in a retroactive manner. Generally, the New Testament marital problem resides in problems of remarriage and only particularly in divorce as seen in the Gospel of Matthew and tacitly in First Corinthians.

In the middle and toward the end of the second century, Christian writers spoke about marriage and remarriage. Justin Martyr, in his First Apology states, "And those who make second marriages according to human law are sinners in the sight of our

teacher, and those who look on a woman to lust after her."⁴ This is reminiscent of the Synoptic exhortations but lacks the Matthean exception in fact or in spirit. For Justin, once persons are married there is no recourse for any other arrangement; this seems to be a strict legal principle. This is also the feeling of Athenagoras in The Plea. He is even more stringent in his concept of marriage. "Thus a man is forbidden both to put her away whose virginity he has ended, and to marry again. He who severs himself from his first wife, even if she is dead, is an adulterer in disguise."⁵

What we have seen so far is a transmutation from apparent principled teachings of Jesus to those more legalistic in nature. It would seem that Athenagoras overlooked some Scripture in his writing even though The Plea antedates the canonization of Scripture by a few short years. He forgets the Jewish law which allowed remarriage upon the death of a spouse. Jesus seems to be in accord with this law. (Mark 12:18-25)

Other Christian writers of this period do not share such a static and inflexible rule on marriage. Clement of Alexandria is a good example and one which manifests a dependence on the apostle Paul, for in his treatise On Marriage he writes, "We admire monogamy and the high standing of single marriage, holding that we ought to share suffering with one another and 'bear one another's burdens,' lest anyone who thinks he stands securely should himself

fall. It is of second marriage that the apostle says, If you burn, marry."⁶ Second marriage is apparently tolerated but not encouraged. Clement's ideal in marriage seems to take into account that the ontological factor of love might well pass away, and his reliance on the Apostle Paul is significant since Paul's toleration is somewhat opposed to the Synoptic tradition.

This toleration is very significant in Eastern thought, for not long after Clement of Alexandria wrote his treatise On Marriage, Cyril of Jerusalem in his Catechetical Lectures touches on the topic of remarriage in "Do not let the once-married set at nought those who have come together in marriage for the second time. For continence is a fine thing, and admirable. But folk may be pardoned for contracting a second marriage, lest infirmity end in fornication."⁷ Though the Eastern idea of the "spiritual death" of marriage is not explicitly stated, it is certainly implied.

The first four centuries of Christian thought on matters of marriage are significant because they determine thinking up to the present time. Generally, two schools of thought on this subject of marriage find their respective positions in the West and in the East. In time these two positions become quite clear, for "since the time of Emperor Justinian I (483-565) there have been two teachings, views, or positions regarding Holy Matrimony among three historic branches of the Holy Catholic Church."⁸ From the Synoptic tradition

and coupled with natural law, the Western Church held a strict rigoristic ethic on marriage while the Eastern Church, following the lead of St. Paul, was more tolerant; this is true even up to the present time.

The question of divorce and remarriage did not become a strictly religious matter until after about the twelfth century. "In both Jewish and Graeco-Roman worlds marriage was regarded not as a civic but as a purely private and individual rite."⁹ The change that took place can be explained in terms of the Church's increasing control over the secular life of medieval times. Indeed, "the first recorded canon requiring a priest to officiate is found at Treves in 1227, but the requirement did not become general throughout Europe until after 1400."¹⁰ This is not to say, however, that the Western Church had nothing to say about divorce and remarriage because a priest of the Church was not present at the marriage rite.

Toleration of divorce and remarriage by the Eastern Church has come to mean each individual case is judged on its merit by the bishop before whom the case has been brought. In this sense the Protestant Episcopal Church is closer to Eastern thinking on marriage matters than to the Western Church. Indeed, "as regards divorce on specified grounds, the Eastern Church has, from the time of Justinian, countenanced such with right of re-marriage."¹¹ It is

ironic, however, that the Protestant Episcopal Church is caught between the Western and Eastern positions regarding marriage.

In the Western Church the legalistic position on marriage was strengthened again and again by various theologians and ecclesiastics. "To sum up, it may be said that from the time of Gratian the teaching of the Decretum, between A. D. 1139 and 1142, forbidding altogether marriage after divorce, was practically the teaching and law of the whole Western Church until the question was again raised at the Reformation."¹² Reformation leaders are the ones who again raise the issues on the position of the Western Church concerning divorce and remarriage because of the ways in which remarriage could take place. "Together with the artificial impediments to wedlock, the Reformation had demolished the machinery for annulling marriages on fictitious grounds."¹³ Historically, the Reformers manifest a decided shift toward Eastern views on divorce and remarriage, but an even more radical approach finally evolved. "The canonical doctrines that marriage is a sacrament and that it is indissoluble save by death were rejected by the Reformers. They all agreed that divorce, with liberty for the innocent party to remarry, should be granted for adultery, and most regarded malicious desertion as a second legitimate cause of the dissolution of marriage."¹⁴

From the Reformation period, however, approaches to matrimonial matters took various avenues of expression. Calvinistic

reformers held the view that civil authority was responsible for marriage laws but with the added impetus of a theocratic basis. "They taught that marriage belonged to the civil order and remitted its judicial control to the State, but they left little scope for legislation. Marriage, though belonging to the civil order, was a sacred thing, if not technically a sacrament, and the State was bound to administer the law of marriage as revealed in Scripture."¹⁵ Essentially, the resultant branches of the Church of the Reformation have remained liberal in their acceptance of divorce and remarriage. Only the Lutheran branches have remained somewhat strict with most branches holding to the position of the indissolubility of marriage.

Continental reform found its way to England where a strange mixture of catholicity and protestantism became nascent. "The collection of proposed canons known as the Reformation Legum Ecclesiasticarum, intended to replace the ancient law of England, allowed divorce for a variety of reasons, with right of remarriage to the innocent spouse only."¹⁶ This principle was short-lived since English laws of marriage "remained unchanged throughout the period under notice, that is, from before the Reformation until after the present canons of 1603-4 came into operation."¹⁷ If the English were willing to reform other vital parts of the Church, they did not seem willing to reform canons on marriage. Indeed, "the present law of

the Church of England clearly does not sanction remarriage after divorce.¹⁸ The Lambeth Conference of 1948 also re-affirmed the doctrine of indissolubility of marriage when in Resolution 92 it stated "that marriage always entails a lifelong union and obligation."¹⁹

Historically what we seem to have are two theological positions on matters of divorce and remarriage. The Eastern position is decidedly liberal in intention and practice while the Roman position is strict and unyielding in legality. It is typical of the Western Roman position to see exceptions to the natural law of the marriage bond, but they are exceptions that never seek to change the law; rather they point to the inherent rightness of the law itself - the law must remain intact regardless of the number of exceptions. Juridically, this is vastly different from Anglo-American law that seeks change through the process of exceptions. The Church of England is caught between these two basic approaches to the nature of law.

The Reformation Churches seemed to have manifested a resurgence of Eastern thought in matters of divorce and remarriage, and in fact, the Protestant liberal attitude seems historically bound to the Eastern position while the English Church appears to remain unique - it is caught in the middle. It was pulled by loyalties to both sides; both to the new reforming ideas of the continental reformers and to its catholic heritage. The English Church had to decide and did decide which position on marriage it should take. The legacy with which the Protestant Episcopal Church has been left is a war

of loyalties between its catholic heritage and the protestant tradition of the reformers and ultimately the ancient Eastern position. The history of the war of loyalties is short but has, nonetheless, culminated in the present marriage canons. We should now turn to see how the present marriage canons historically came to fruition.

A History of the Present Canons on Marriage

When the Protestant Episcopal Church was newly established in 1789, it did not have much in the way of canon law; indeed, about all it had were some vestigial elements of English Church law contained in seventeen canons. By the Convention of 1808 in Baltimore, however, it had a residue of canons which was beginning to grow quantitatively. Expressed thoughts on marriage laws were made for the first time that year in the form of a resolution which read, "Resolved, that it is the sense of this Church, that it is inconsistent with the law of God, and the Ministers of this Church, therefore, shall not unite in matrimony any person who is divorced unless it be on account of the other party having been guilty of adultery."²⁰ The English and Western influence is clearly seen in this short resolution, a resolution which became canon law and remained in that early form until the Convention of 1868 in New York.

In New York the General Convention of 1868 enacted Canon 13 under Title II as its stand on marriage and divorce.

Divorce was, even then, becoming a cause for concern, and the Convention that year felt a need to present the Church's position on divorce and remarriage. The enactment of Canon 13 is in essence a restatement of the 1808 resolution and read as follows, "No Minister of this Church shall solemnize matrimony in any case where there is a divorced wife or husband of either party still living: but this canon shall not be held to apply to the innocent party in a divorce for the cause of adultery, or to parties once divorced seeking to be united again."²¹

As far back as the 1868 New York Convention, a proposal was brought forward that foreshadowed more recent feelings on the marriage canons. It was proposed that "the House of Bishops concurring, that the Bishop and Standing Committee of each Diocese be constituted an Ecclesiastical Court to examine all cases of re-marriage of parties who have obtained divorce in legal tribunals for causes other than that of adultery, and that their decision shall govern in all cases submitted to them."²² This resolution made during the Convention of 1868 not only foreshadows more recent feelings on divorce and remarriage matters but also nullity. Civil divorce could conceivably be deemed annulment by the Church. It is also noteworthy that the law of nullity only came to fruition very recently in Episcopal canon law although it had been latent since the inception of the American Church.

In 1877 the Convention was held in Boston, and additional points were added to the 1868 enactment. The law of nullity is seen in its nascent form in sections of Canon 13, Title II of the 1877 Canons. This is illustrated by section one stating "if any person be joined together otherwise than as God's Word doth allow, their marriage is not lawful."²³ Therein lies the incipient form of the later, although not by name, nullity canon. Questions of admission to the Holy Communion, Baptism, and Confirmation were also covered by the Convention of 1877 for persons involved in questionable marriage status or "otherwise than as the Word of God and discipline of this Church allow."²⁴ These were referred to the bishop for his godly judgment whether or not they could be admitted to the privileges of the Church. Not only does this particular canon declare canonical directives in matters of marriage but one can also see a developing residue of authority in the bishop. It would seem that a latent English monarchial-bishop thrust is reappearing but in an ever-so-slight form.

The canon of marriage of 1877 stood until the Convention of 1904 which met again in Boston, Massachusetts. The older canons appearing under three Titles in the Digest were amended, adopted, and codified simply as the Canons. Canon 13, Title II relating to marriage now appeared as Canon 38 of the newly codified Canons, and the basic marriage canons of previous Conventions were amended and adopted. Various important measures in canonical directives came

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adopted. Various important measures in canonical directives came out of this Convention and are noteworthy. Section one of the new Canon 38 now read that ministers must abide by civil law governing whatever locality in which a marriage is to take place. This replaced section one of the 1877 Canon 13, Title II which spoke tacitly of the law of nullity. Indeed, the new Canon 38 seemed to neglect the law of nullity altogether.

Other new measures also appeared in the new canon on marriage, for two witnesses were required at the solemnization of marriage along with the recording of the marriage as a matter of parish record. An additional investment of authority was placed in the hands of the bishop since divorced persons now had to apply to the bishop for his judgment in cases of remarriage even though the only recognized cause for divorce was adultery. This new canon also inserted a time lapse of one year after civil decree of divorce before a divorced person could apply to the bishop for his judgment on remarriage. Court records and decrees were not necessary, but their use was urged by the canon. A bishop's judgment is still deemed necessary by this canon in matters of communicant status where persons may have been married contrary to God's Word and the discipline of this Church. Also, for the first time, a section was added to the marriage canon which clearly stated that a minister could decline to solemnize any marriage. Not only does one see an

ascendency of authority of bishops but also an increasing freedom of ministers since now they could, by canon, decline to marry persons whom they could not marry in good conscience. The important thing is that protection for clergy in marital matters now existed in canon law. Generally, the canon represents a step forward in marital directives, and historically, it represents a type of compromise between bishops and priests. There is, however, an increasing role of authority placed in the bishop, but the fact that a minister may decline to solemnize a marriage is important in the political structure of the Church.

At the 1916 Convention held in St. Louis the Joint Commission on Holy Matrimony suggested the following resolutions be amended to the marriage canon, by this time codified as number forty. "No marriage shall be solemnized in this Church between parties either of whom has a husband or wife still living, who has been divorced for any cause arising after marriage."²⁵ There is a noticeable absence of the "exception clause" which ostensibly was brought about by biblical scholarship that recognized the improbability of the Matthean exception being the actual words of Jesus. The second resolution set before this Convention was simply a nascent form of a law of nullity. When applicants for remarriage could prove a civil divorce was granted and the grounds for that divorce were actually causes arising before marriage and "where this claim is

established by the record, the Ecclesiastical Authority shall declare in writing that such a Divorce, being in fact a Decree of Annulment, is no bar to the marriage of either party.²⁶ Although these resolutions are simply resolutions they express the mind of a part of the Church towards a canon of nullity. Not, however, until the Convention of 1931 in Denver, Colorado did the latter of these resolutions take canonical form.

In Denver the Convention of 1931 amended the existing canon on marriage and added a section setting down the law of nullity with a list of impediments to marriage. Other pertinent new sections dealt with the instruction in the nature of Holy Matrimony to those parties who were about to be married in the Church and a three-day notification limit on the desire to be married by a minister of this Church. The resolution of the deletion of the "exception clause" was not adopted, and it remained in the canon. Important in this Convention is the adoption of a full-fledged canon of nullity outlining the limits and defining the canonical procedures for the procurement of a judgment of nullity by a bishop.

Controversy about the marriage canon continued for the next few years until the Convention of 1943 held in Cleveland, Ohio when various resolutions were brought to a vote. The structure of the marriage canon was changed by this Convention, and instead of one rather large canon two smaller canons were adopted. The

marriage canon was now two canons: one dealing with the solemnization of Holy Matrimony and the other stating the regulations respecting Holy Matrimony together with the impediments.

Apart from this structural change the canon of 1931 remained the same but not before various ideas and interpretations were set before the Convention. The resolution by the Commission on Holy Matrimony, which had been appointed by the 1940 Convention, to delete the "exception clause" from the canon is a recurrence of history, but the reason for deletion had changed considerably. Instead of a deletion of the Matthean clause based on biblical scholarship, the commission expressed that, "quite apart from its doubtful authenticity and quite apart from the fact that Christian marriage is indissoluble, it seems to us that to make physical infidelity a sole justification for divorce denies the spiritual nature of marriage."²⁷ Controversy on this issue finally culminated in a vote by the Convention, and "in the Convention of 1943, out of 522 members voting, 446 favored one or another change which would eliminate the Matthean exception, but they could not agree on what change to adopt."²⁸

Another important resolution was set forth by the new Commission on Holy Matrimony in the form of a Declaration of Intention. The commission suggested "there is nothing in this Statement that is not found or implied in the Office, it is a fact that thus re-stated, the vows gain in force. Moreover, the Statement forms

an excellent basis for pre-marital instruction."²⁹ One further minor resolution suggested that "at least one party to the proposed marriage has received Holy Baptism."³⁰ Although these resolutions did not find their way into the Canons during the Convention, they did so during the course of the next few Conventions. The marriage canon of 1931 remained, however, in the Canons of 1943 with only a structural and numerical change.

"In 1946 the Joint Commission of Marriage and Divorce tried once again with a proposed new canon."³¹ Some of the resolutions of the previous Commission were re-asserted, especially the resolutions concerning the deletion of the exception clause and the declaration of intention. The resolution that one party to a proposed marriage must have been baptized came up again along with a change of position in the Canons of the duty of a minister to provide public instruction on marriage and the family. The final draft of the proposed new canon was brought before the Convention, but controversy raged and the session was stormy indeed. On the motion by a bishop "the House decided to refer the proposed amendments to the Canons on Holy Matrimony with all amendments offered, to a special Committee, to report the following morning a substitute for all proposed actions."³² The Committee brought forward a proposed new canon which was accepted and which became the marriage canon of 1946. The legislation was done hastily and rationale for the

marriage canons did not appear until the following Convention of 1949. The new canon placed the impediments to marriage under Canon 17, "Of the Solemnization of Holy Matrimony," while annulment procedures fell under Canon 18, "Of Regulation Respecting Holy Matrimony," referring to Canon 17 for guidelines in cases of nullity and supposedly divorce. The section in Canon 18 referring to the impediments of Canon 17 could easily be interpreted to apply to divorce relying on the clause, "to exist or to have existed," in Canon 18. "It is not so much that this canon is obscure or difficult of interpretation as that it reflects its origin in being utterly inconsistent with itself."³³ The resolution containing the declaration of intention was not brought forward by the special Committee and did not find its way into the canon of 1946.

The rationale behind acceptance of the proposed canon of 1946 was well outlined in the report of the Commission on Marriage in 1949. The Commission stated that "under our present Canon no Bishop who holds that only nullity justifies a second marriage need do violence to his conscience; and, on the other hand, a Bishop who holds that causes arising after marriage can dissolve the bond is permitted to give judgment accordingly within the limits of the general causes listed in the previous Canon as impediments."³⁴ Thus a simple but complex compromise that had and has many ramifications came to be canon law. The Convention of 1949 also included in the

Canons the Declaration of Intention which had been suggested in the Convention of 1940 and has been found valuable in marriage counseling.

The final canon of 1949 is the Canon on Marriage now in force in the Protestant Episcopal Church. There are those, however, who were and are in favor of a more uniform law. During the convention of 1958 a resolution was brought before the Convention that would have made the marriage canons into strictly canons of nullity. A point must be granted for at least part of the underlying motivation for the resolution. The fact that pragmatic results of cases of nullity, divorce, and remarriage depend on domicile was recognized as weak procedure for a church wishing to speak as one is a point well taken. Inconsistency with the Form of Solemnization of Holy Matrimony in the Book of Common Prayer which seems to denote the indissolubility of marriage was also brought out as a point in favor of a canon of nullity only. The Joint Commission of Holy Matrimony countered this resolution by stating that "it would be agreed by the great majority of the bishops who administer the discipline of the Church, that the present Canons, imperfect as they are, do permit a positive and redemptive approach to the heavy problems of marriage and divorce in our society; that they do permit appropriate justice to be done without corroding our witness to Christian standards,"³⁵ is to be considered.

Present marriage canons of the Protestant Episcopal Church represent a short history of wrestling with theological as well as social and psychological problems that have arisen in the short history of the American Church. They represent also a compromise which, on the face of it, permits bishops to do no violence to their several consciences. The fact that it is so would seem to lead to the argument that a canon of divorce is possible. There is now present in the marriage canons a mixture of nullity and divorce concepts, and if that be the case, then a divorce canon seems imminent. Only time and the leading of the Spirit will determine what canons on marriage will be in the next few years.

Footnotes - Chapter I

¹ Johannes Weiss, Earliest Christianity (New York: Harper & Brothers, Published, 1959), p. 330.

² Ibid., p. 330

³ Frederick C. Grant, "Marriage: The Gospel and Canon Law," The Churchman, 151:15, (September, 1937), p. 10.

⁴ Cyril C. Richardson (ed.), Early Christian Fathers in Library of Christian Classics, Justin Martyr, "First Apology," (Philadelphia: The Westminster Press, 1953), p. 250.

⁵ Ibid., Athenagoras, "The Plea," p. 337.

⁶ Henry Chadwick (ed.), Alexandrian Christianity in Library of Christian Classics, Clement of Alexandria, "On Marriage," (Philadelphia: The Westminster Press, 1954), p. 42.

⁷ Ibid., Cyril of Jerusalem, "Catechetical Lectures," p. 113.

⁸ Walter H. Stowe, "The Debate on the Marriage Canon," The Living Church, 107:17, p. 6.

⁹ Burton S. Easton, "Divorce and the New Testament," Anglican Theological Review, 22:2, (April, 1940), p. 78.

¹⁰ Ibid., p. 79.

¹¹ Arthur T. Macmillan, What is Christian Marriage? (London: Macmillan & Co. Ltd., 1944), p. 89.

¹² Ibid., p. 91.

¹³ Edward Westermarck, A Short History of Marriage (London: Macmillan & Co., 1926), p. 293.

¹⁴ Ibid., p. 291

¹⁵ Macmillan, op. cit., p. 94.

¹⁶ Ibid., p. 92.

¹⁷ Lewis Dibbin and Healey Chadwyck, English Church Law and Divorce (London: John Murray & Co., 1912), p. 78.

¹⁸ Macmillan, op. cit., p. 93.

¹⁹ Spenser Ervin, Anglican Marriage Law (Ambler, Pa: Trinity Press) p. 30.

²⁰ William S. Perry (ed.), Journal of the Proceeding of the Bishops, Clergy, Laity of the Protestant Episcopal Church in the United States of America, held in the City of Baltimore, Maryland, May, 1808. (Claremont, N. H., Claremont Manufacturing Co. 1874), p. 348.

²¹ Journal of the Proceedings of the Bishops, Clergy, Laity of the Protestant Episcopal Church in the United States of America, held in New York, Oct., 1868. (Hartford: Church Press Co., 1869), p. 139.

²² Ibid., p. 125

²³ Journal of the Proceedings of the Bishops, Clergy, Laity of the Protestant Episcopal Church in the United States of America, held in Boston, Oct., 1877. "Digest of the Canons," (Boston: Alfred Mudge & Son., 1878), p. 126.

²⁴ Ibid., p. 122.

²⁵ Journal of the General Convention held in St. Louis, Oct., 1916. (New York: The Sherwood Press, 1917), p. 504.

²⁶ Ibid., p. 504.

²⁷ Journal of the General Convention held in Cleveland, Oct., 1943. (Hammond, Indiana: W. B. Conkey Co., 1943), p. 437.

²⁸ G. Gardner Monks, "Living With The Marriage Canon," The Living Church, 152:11, (March 13, 1966), p. 17.

²⁹ Journal of the General Convention, (Cleveland, 1943), op. cit., p. 436.

³⁰ Ibid., p. 439.

³¹ Monks, op. cit., p. 2

³²Journal of the General Convention of the Protestant Episcopal Church held in Philadelphia, Sept., 1946. (Hammond, Indiana: W. B. Conkey Co. 1947), p. 249.

³³Monks, op. cit., p. 3.

³⁴Journal of the General Convention of the Protestant Episcopal Church held in San Francisco, Sept.-Oct., 1949. (Hammond, Indiana: W. B. Conkey Co., 1949), p. 440.

³⁵Journal of the General Convention of the Protestant Episcopal Church held in Miami Beach, Florida, Oct., 1958. (Hammond, Indiana: W. B. Conkey Co., 1958), p. 196.

II

The Problems Before Us

When we begin to think about the problems that confront us in the area of marriage, we begin to see a vast arena of problems and many respective solutions. Not only the various and totally different types of problems presented by persons to the Church are seen but also the problems the Church has in attempting to bring order out of chaos.

It is self-evident that many marriage relationships are finding it difficult to maintain themselves, and consequently divorce is on the rise in our American culture. Conterminous with this is the fact of remarriage on a large social scale. These problems, however, are not only personal in nature - they take on wider social and cultural interests. Christian ministers and laity alike are concerned about social order, divorce, and remarriage, and with persons who are directly or indirectly involved in marital problems. Whenever Christian ministers are confronted by persons who are having either marital conflicts or marital problems, they are being confronted by particular symptoms of larger social problems.

The situation of marriage problems in the twentieth century presents many sides with which the Church should deal. There are persons involved in crisis situations, and the manner and approach with which these situations will be handled by ministers and other

managers of society will be very important. Within the Church varying approaches of law manifest themselves, and questions of the need for marriage laws arise from time to time. The Protestant Episcopal Church, for instance, seems to hold to the traditional Anglo-American need for written contract being the legal determinant for validity in marriage. This is quite important when the question of nullity arises. Our approach to law in general is not to look for exceptions but rather to see whether or not new situations can bring about new law. The old law passes away and new law comes into being.

Theologically, the problem of divorce and nullity becomes analogically Calvinistic or Arminian; that is, the question becomes one of whether or not a marriage really is "once for all" once it has been established.

Cultural problems also present themselves. We now seem to be engulfed in a megalomania of delusions of romantic love. Our culture speaks of falling in and out of love as though it were a choice between perfumes and deodorants. The romantic love evidenced in motion pictures is so glorified that it is no wonder that young persons become obsessed with false ideas about love. I suspect that it is these false impressions of love that many times carry over into the adult life and implement marital conflicts and problems. The Church attempts, in its social and cultural concerns, to set forth a clear

picture of love in order to rise above existing mores and to respond to the Gospel proclamation. This is clearly in the Church's jurisdiction to do so. The variety of problems then, are not only personalized but also have profound cultural and theological facets.

Where does all this begin? It begins in the arena of history where social opinions and cultural conditions dictate and indeed manifest dynamic change. Each era of history manifests certain social opinion on marital matters. There are those who would argue for a return to first principles, but what are those first principles? Do we return to the principles of the first century, the principles of Jesus of Nazareth? Since his principles are not legalistic principles but rather broad guidelines for ethical decision, I would see the Church implementing them, considering the social scene of twentieth century America. More conservative interpreters of Church marriage law forget too easily that their insistence on the ideal as being fact is clearly a social and cultural affectation of earlier history.

From the very first the principles of Jesus were thrown into a legalistic cast and much of the intention of principle was lost. But that was a matter of the social and cultural opinions permeating and recasting the broad principles of Jesus. The Church seems always to have included and incorporated social opinion into its frame of reference. This is not to say that the Church did not attempt to

work through these changing social conditions in proclaiming its message. Indeed, the Church has always worked through its cultural setting, and this is no less true in matters of marriage. The twentieth century presents a totally different picture of social opinion on divorce and remarriage. The Church cannot hope to witness to God's redemptive action in the life of men if she continues to hold to solutions that were fitting in other historical periods and different cultural conditions.

The way in which the Church approaches the meaning of the ideal in marriage will be altogether very important. "What we need now is a new social Gospel, but different from that of the last generation in that it does not strive for a social order but for personal community."¹ This is not to throw out order but only a certain kind of order; an order dogmatically cast in legality. "We need a personalistic communism and a sacramental existentialism, which would fill the empty frame of the new social order, and at the same time fulfil the highest aspirations of those who created it."²

A phenomenon of the twentieth century seems to be to speak disparagingly of social institutions and especially, marriage. Herein lies a social problem with which the Church has implicit and explicit jurisdiction to inform and correct. Since the twentieth century also seems to be a century in which individualistic concerns are very great, the Church would do well to develop a theology of marriage placing the maintenance of the marriage relationship solely on individual obligations

and at the same time recognize the fact of human failure when these obligations are not met. It seems to me that the crux of the problems relating to marital situations of divorce and remarriage is centered in ontological and existential factors. It is possible to be committed to an ideal and quite another thing to be committed to a person, but when the ideal means being committed to another person, then commitment to the ideal and the other person become one.

Never is there a time when the Church can close its eyes to social conditions. It has opened its eyes in other social areas of concern, and divorce and remarriage are of no less real concern. At the present time approximately twenty-five out of every one hundred marriages being contracted will end in divorce. It is one thing for the Church to be aware of existing marriage conditions and even develop and teach a new theology of marriage, but in dealing with the problems that arise out of the conditions, an equal development of law is as important. The present marriage canons of the Protestant Episcopal Church attempt to keep up with changing social conditions but in a very ambiguous way. Clearer language is needed and further delineation of the meaning of various legal concepts is certainly needed. In short, we need a better canonical directive.

There is another very basic problem with which the Church should deal. The Church needs somehow to find the dividing line between the Christian obligation to the ideal of maintaining the

institution of marriage and the ideal of intention of commitment to the other person when divorce and remarriage come on the scene. A theology of marriage that relies solely on feeling is not the solution nor is reliance on a strict legal principle of indissolubility. A better canonical directive could help in setting up guidelines that would implement the Church's concern to see justice done to both the institution of marriage and the persons involved in divorce, annulment, or remarriage situations. What is the approach that the Church should take? Should it be purely a canonical and legal approach? Should it be a completely pastoral approach? Is there a feasible combination of these two approaches?

The Protestant Episcopal Church's use of its present marriage canons takes many avenues of expression. There are those who are convinced that annulment of the former marriage is necessary to contract another marriage, and one reading of the present marriage canons seems to support this as the only real possibility. Others feel that divorce is sanctioned by the canons and a second reading of the canons can easily support this approach. Contiguous with this second alternative is the feeling that Christians with sincere intentions should never be denied the blessing of a second marriage. Various interpretations in both camps feel conditions present in the former marriage are determinative in cases of nullity, divorce, and remarriage. Others would hold that both factors of previous marriage and proposed marriage should be considered in application for remarriage.

Seen thus far is a vast and complex area of human relationship that has social, legal, religious, and cultural ramifications. The pastoral impetus should clearly be the import of the Church, for it is the Church that registers concern in all areas of life. The problem of divorce is clear, and the cultural "teaching" of love presents a problem. The nature of law is under question when problems of divorce, nullity, and remarriage arise and are brought before the Church. Again, the question of what approach the Church should take becomes paramount. Within the present structure of the marriage canons of the Protestant Episcopal Church are several avenues of approach that become apparent in case studies. There are cases in which the present canons on marriage are not used at all in determining judgments on marital relationships. Consideration should be given to see whether or not there has been a due process of law and whether or not a pragmatic resultant judgment of a case has been arrived at by canonical means. In other words, a judgment by a bishop may be good and equitable, but the methods and reasons employed in reaching that decision may be suspect if measured against the present canon.

Many cases regarding divorce, nullity, and remarriage come before the bishops of each diocese each year. Among these cases are some which are clear concerning what the judgment should be while there are others in which much time is needed to determine

a correct judgment. Some of the difficult cases along with some of the more routine will be presented, and their respective problems and solutions will be discussed.

Since the marriage canons are primarily canons of nullity, the usual request of those seeking remarriage is to have a first marriage annulled. An examination of a few cases is in order.

Case One³

A female applicant applied for permission to be married in the Church to "one whose previous marriage has been dissolved by a civil court." The intended spouse is a member of the Church and attends regularly. Canon 18, section 2a is being followed.

The intended spouse was married to his previous wife when she was fifteen years of age, and he was twenty. The marriage took place with both parents on both sides consenting, and a few days later he was shipped overseas on armed service duty. He remained there for several months and returned to find that his wife had been unfaithful to him on several occasions. After his return, however, they decided to attempt a reconciliation, and all went well for several months. Thereupon she began to be unfaithful again, and all attempts to persuade her to lead a different life were to no avail. Divorce action ensued with mental cruelty as the ground for the civil action. The wife has been married several times since. Permission, after due inquiry, was given for the intended spouse to be married in the

Church since his previous marriage was found to be null and void.

Canon 18, section 2b and Canon 17, section 2b, number 9 were used.

The question must be asked, with what are we dealing in this case? Is the case really one of clear-cut nullity? The intended spouse and his first wife lived together for only a very short time, but upon his return reconciliation actually occurred for some months. The marriage was witnessed by parents on both sides, and all other marriage intentions seemed in force. The central question concerning the first marriage is to determine if any impediments were really present at the time of the wedding. There are two possible choices of impediments that might apply, but they both seem to be rather suspect in application to this case. Impediments three and nine which state respectively, "Mental deficiency of either party sufficient to prevent the exercise of intelligent choice," and ". . . such defects of personality as to make competent or free consent impossible," could be used if all the integral facts of the relationship were known. But free consent and family witness are in evidence along with no apparent hint of a defect of personality. There simply doesn't seem to be an impediment to cover this case to allow nullity unless immaturity were to fall under the section of defect of personality. It is clear the resultant judgment by the bishop was fair, just, and needed, but the resultant judgment in this case does not seem to fall within

marriage which enables one to become one with another and yet remain as one. Commitment in love involves courage and risk. A theology of marriage speaking of risk and courage based on love is a theology of marriage recognizing an existential ontology. Within marriage are certain structures of reality depending on individual contingencies and personal risk. That is the way things existentially are. To be in love is at once anxiety-producing and freedom-producing. The fear of nonbeing, that fear of no longer being cared for and left totally alone, calls for courage, but this involves a wider courage about the meaning of life. "Courage is the self-affirmation of being in spite of the fact of nonbeing. . . Courage always includes a risk, it is always threatened by nonbeing, whether the risk of losing oneself and becoming a thing within the whole of things or of losing one's world in an empty self-relatedness."⁹

This type of ontology, this way of looking at reality contains existential risk. The risk to commit oneself to another goes beyond social contract and the religious dictum of "once for all." A strict moralism saying that the marriage bond is always indissoluble and remarriage of divorced persons is prohibited is a distortion of morality. "It is a distortion of the moral imperative into an oppressive law. It is an attitude, a negative one, against which theology and psychology should wage a common war."¹⁰

Thus far I have set forth what I think are some of the most important elements in the marriage relationship. Marriage is a matter of covenant involving commitment and risk, and it is a matter of mutual intention of the persons entering marriage to intend to give to one another of themselves so that mutual benefits may be derived. Courage is involved: the courage to be oneself and also part of the other. In marriage it is the matter of the one that is important. Covenant and commitment are based on giving love. "In love there must be revealed neither the mystery of femininity nor that of masculinity, but rather the mystery of man."¹¹ In this lies the androgynous nature of the marriage relationship. When the mystery of man is revealed, then true freedom ensues. Implicit in this is sex. "Those who defend certain concepts of sexual freedom have mounted an attack on the institution of marriage. But what is freedom? Does it truly consist in responding to every prompting of natural desire? Such freedom is short-lived. Because it has no other point of reference but itself, it becomes enslaved by the senses and dies."¹² The marriage relationship depends on all factors of covenant, commitment, risk, and sex. Love is the binding element that enables these factors to come to fruition in growth and rapport.

Because of this type of a theology of marriage, I see a need for reform in canonical directives in matters of marriage.

When part or all of these elements begin to fragment, a marriage is in trouble. When these elements disappear altogether and the only possible solution is divorce and probably remarriage, a "fresh start" is certainly needed. How can the Church better relate itself to this situation? Counseling, of course, is an avenue; but after the fact of human failure and marriage-breakdown, a better procedure of law is needed to implement the belief of the Church in redemption. The need of the Church for reform in the marriage canons is not only apparent but imperative.

The Need for Reform

Is a revision of the existing marriage canons really needed in the light of what has been set forth as a theology of marriage? For me, the answer is a decided yes. It is possible to say there is disparity in what the Gospel means by marriage and, hence, relationship and what demands are made on marriage by the existing canons. The need for new marriage canons does not imply a defenestration and a whole new beginning. Indeed, to revise the present marriage canons, means to make the language clearer so that a better canonical directive in matters of marriage is available. Up until 1946 the Protestant Episcopal Church has had little to help its members and ministers deal with marriage problems on a canonical level. I am

not seeking an "easy canon" in matters of divorce and remarriage but rather a picture of honesty. There are cases, as have been previously mentioned, that legally and canonically are no longer marriages and ontologically, existentially, and in truth, theologically have fragmented into lifeless relationships.

How then should new marriage canons differ from existing ones? The first area of concern in a revision is clearer language. To be sure, the marriage canons are quite clear on certain matters but are quite unclear on others. The central problem of the marriage canons resides in matters of divorce and more particularly in remarriage. Language concerning nullity and dissolution in the present canons is unclear since these terms are interpreted to mean the same thing one time while at another they mean something entirely different. Liberal interpreters of the marriage canons use clearly defined impediments to marriage as grounds for divorce in appeal situations concerning divorce, but the impediments are clearly stated as relating only to nullity. The legal trick is to rely on an interpretation of "dissolved" meaning divorce and then use the impediments for nullity as grounds for divorce - clearly not good procedure. A reform of the present canons would state as clearly as possible that the impediments are for nullity and another set of grounds for divorce, not now existing, would apply only to divorce. Another alternative would have the

marriage canons state a strict legal interpretation of marriage whereby dissolution means only nullity, and divorce would be allowed only in extreme cases. An approach such as this would in itself bring about a better canonical directive even though it might mean great expense to persons in difficult situations calling for divorce. However, they would know where they stand in the eyes of the Church.

The ambiguity of the present marriage canons is such that they attempt to satisfy two positions on the question of divorce and remarriage. The traditional Western position (Roman Catholic) is implicit since the existence of a marriage can be deemed nonexistent by means of the impediments unless the word "dissolved" is interpreted to mean divorce. If that interpretation is taken, an implicit Eastern position of the sanction of divorce and remarriage is also present. It can be argued this Anglican ambiguity should remain, but for what good purpose? Can this kind of ambiguity really proclaim the truth of the Gospel that would seem to be so necessary for the twentieth century? I think not, since "there certainly are cases for which the only possible solution, apparently is divorce, and that means remarriage in most cases. Nor does the Church add credit to itself in recognizing this fact in one breath, but denying the Christian status to those who remarry, in the next: or in counselling the divorced to marry elsewhere, outside the church,

and then come back as communicants, in good standing, as if nothing had happened."¹³

In connection with this ambiguity two opposed ideals of Christian marriage seem to be present. The Declaration of Intention complements a theology of marriage based on the way things ought to be. The marriage canons viewed as a whole, however, would lead one to see a theology of marriage primarily concerned with the structure and social nature of marriage. Should the marriage canons remain ambiguous at this point? I think not. A revised canon should attempt to set forth a view of marriage commensurate with the Gospel news of new life and redemption. A canon chained to a legality that could possibly strangle human personalities is certainly not part of the Gospel. It is easily recognized that canons on marriage can never hope to be totally comprehensive and inclusive of all situations, but the "blik" of the canons can be such that the categories of situational law, love at the basis of an ontology, and existential factors can be taken into account. It is axiomatic that all canons fall under the authority of theology, but the question is, what kind of theology? If we conceive of a theology of marriage speaking of indissolubility with purely static meaning, then the marriage canons should implement that theology. If, on the other hand, we conceive of a theology of marriage recognizing that marriage relationships which lose their reason for being are no longer marriages, then the marriage canons should implement that kind of theology.

Another area of concern has to do with a due process of law. The present canonical directive directs persons who want to be remarried to apply to the Ecclesiastical Authority for judgment on their particular case. No mention of the parish priest and what his role might be in situations concerning divorce and remarriage is made. A revised marriage canon should include something about the role the consultant minister might play, and his absence from the present canons might seem to imply a fear of the Church to really participate in broken relationships other than from a purely hierachial vantage point. The case may be just the opposite, but the canons would structurally allow for better directives if the parish priest were somehow included in judgments on marital problems.

Another area of revision would take into account the liberal interpretation of the word "dissolved." If the present canons allow for some laxity in regard to divorce and subsequent remarriage, a marriage canon should include grounds for divorce. An additional section on divorce would be most helpful if we are to be pastorally concerned about persons who need divorce and who want remarriage. A section should also be included that would direct the bishop to review civil cases in case of nebulous situations. If the Church takes seriously its commitment to persons in difficulty, all available resources should be placed at the disposal of the bishop and the

diocesan marriage court of appeal. The marriage canons are lacking also in directing each diocese to set up a marriage court of appeals in each diocese, though most dioceses might have such courts. Necessity for a marriage court in each diocese should be stated by canon law; the rationale for such a court is not only to help with a possibly high work load of marital problems brought before the bishop but also to help in his judgment in each case.

Whether we like it or not, any shifting around the present canon breeds dishonesty. Ministers and laity alike do what they feel is necessary to avoid the consequences of the intentions of the present marriage canons. In certain cases ministers will feel obliged to send persons with problems concerning divorce and remarriage elsewhere because of a clear paucity in the marriage canons. Laity in other instances, upon hearing about a neighboring liberal bishop, will take up residence in another diocese in order to obtain a marital judgment in their favor. Existence of these possibilities makes the canon ludicrous law. In this connection, a synodical marriage court of appeal could pass judgment on such cases. I am not against the procedures of appeal, but the manner in which they are premitted is not good law. Establishment of synodical marriage courts would be a step forward in developing a more uniform system of appeal procedure.

In view of these suggestions for revisions, I am also in favor of a separate canon on nullity and one on divorce. It is also my opinion that the Church should accept civil annulment as binding but not without due examination of particular cases. I am in favor of making the lapse of time after civil annulment before application to a bishop only a three-month period. Annulment would seem to require less time to lapse before a proposed marriage takes place than that of divorce. This time limit should apply to persons who may or may not have an intended spouse in mind. In matters of divorce there should be specific ground mentioned with which the bishop may judge cases of divorce coming before him.

Many of these above suggested revisions have come up before various general conventions of the Church in times past. Need for such revision is very clear, and the feeling of many clergymen is that the time has come to take action. We may well want to preserve Anglican ambiguity elsewhere in the Church but not in matters concerning nullity, divorce, and remarriage.

There are, however, many fine points in the present canons that should remain. The section stating that a minister may decline to solemnize any marriage is a needed section, since it supplies the minister with a canon rationale that would be commensurate with the minister's feeling that in good conscience he could not bless a particular marriage. The declaration of intention

as a section of the marriage canons was a very important insertion into the canons and should remain since it sets forth guidelines for the marriage relationship. The impediments to marriage are very important legal instruments whereby the minister may determine whether or not a marriage should really be contracted.

Revision of the marriage canons, then, entails making certain language clearer and retaining sections that are good safeguards, both for the persons with marital problems and the Church. Revision must also manifest a certain integrity emanating from the Church's courage to be the redemptive community it was called to be, and canon law sets out certain guidelines to make that redemptive action possible. A revision does not necessarily imply an easy way out but rather the setting up of Christian norms for procedures concerning persons in situations where divorce has happened and remarriage is needed and wanted. An appraisal of the marriage canons in the light of the Gospel is also needed before any sound declaration and provisions can be made in regard to a revised marriage canon.

Footnotes - Chapter III

¹Henry A. Bowman, A Christian Interpretation of Marriage (Philadelphia: Westminister Press, 1959), p. 21.

²Peter A. Bertocci, The Human Venture in Sex, Love and Marriage (New York: Association Press, 1949), p. 58.

³J. Howard Cruse, and Bryan Green, Marriage, Divorce, and Repentance in the Church of England (London: Hodder and Stoughton Ltd., 1949), p. 15.

⁴Ibid., p. 5.

⁵Walter Boulton, Marriage (London: S. P. C. K., 1963) p. 9.

⁶Bertocci, op. cit., p. 143.

⁷Cruse and Green, op. cit., p. 82.

⁸Ibid., p. 14.

⁹Paul Tillich, The Courage To Be (New Haven: Yale University, 1952), p. 155.

¹⁰Paul Tillich, Theology of Culture (New York: Oxford University Press, 1959), p. 133.

¹¹Nicolas Berdyaev, The Meaning of the Creative Act (New York: Collier Books, 1962), p. 208.

¹²Robert Grimm, Love and Sexuality (New York: Association Press, 1964), pp. 115-116.

¹³Frederick C. Grant, "Marriage: The Gospel and Canon Law," The Churchman, 151:15, (September, 1937), p. 13.

IV

The Gospel and Canon Law

The first three chapters have led to the turning point of this whole thesis. We have seen some of the problems in canonical directives and a short history of marriage laws in the history of the Church and more particularly in the Protestant Episcopal Church. We have also seen a theology of marriage that attempted to state the obligation to the Christian ideal in marriage, that is, an obligation both to the other person in the marriage relationship and to the marriage relationship itself. Since the ideal in Christian marriage is based in commitment to the other person, then obligation to the other person and to the relationship become one in intention. I think it is now requisite to discuss the relationship of the present marriage canons to the Gospel and the Christian Faith.

As we look at the marriage canons and the Gospel in a perspective manner, certain themes or concepts come to mind. Concepts of natural law and situation law are immediately discernible. The nature of freedom and the ascent to authority become paramount concerns. But one might argue that these themes and concepts run through the whole of society. What is the nature of man in relationship, ? becomes a very real question when confrontation with law and social custom occurs. The social heteronomous condition and how much freedom lies within that structure is a

concern for every individual in our society. The Church, no less than any other viable institution, is caught between the tension of autonomy and heteronomy. Indeed, the Christian Faith recognizes the fact that the human condition is an alternating current from autonomy to heteronomy and from heteronomy to autonomy. "In so far as autonomy is an expression of man's growth to maturity, religion has no quarrel with it. There is no escape from autonomy into any kind of heteronomy."¹ In the same sense, there is no escape from heteronomy to autonomy. But the Christian Faith teaches more than a simple dialectic between freedom and law. It teaches that the middle ground of such tension lies in the personal, and because the personal is the center of our existence in our society, the Church places responsibility on the individual in matters of relationship. But that seems only to speak of freedom. At the same time, however, the Church recognizes that law is not the way of salvation but is a means of checking the truth and validity of the Gospel. Law maintains the "oughtness" of the Gospel imperative. The law of the Gospel attempts to hold freedom and law in tension while recognizing the personal worth of the individual. "The overwhelming need of society today is to prevent personal existence from being submerged by impersonal forces and technical requirements, to affirm the reality of love in face of the reality of power."²

Therein lies the task of the Church, especially in marital matters where human existence is focused as personal.

The Gospel then, attempts to make demands of the personal yet recognizes that the personal is the concrete center where human failure is always possible. The good news, indeed, is the news of redemption in the face of failure. If this be the theological import of the Gospel and theology governs canon law, then the message of redemption must permeate all of canon law. The principles of Jesus of Nazareth express that good news since He Himself is the embodiment of them. "It is no use taking 'principle' to mean 'legal principle'; for he (Jesus) was not concerned with legislation, (Luke 12:14) he had no use for casuists (Mark 7: 9-13, Matt. 23: 13-28); and instead of laying down legal principles as the basis of a new law, he was engaged in setting up ideals, new goals, and aims for human life."³ The marriage canons can and should be the place where principle means goal and aim, and coupled with the good news of redemption, they could manifest the true meaning of the Gospel because of the personal nature of marriage. But because it is personal, failure takes on a wider social meaning. Personal has no meaning apart from the other, either in failure or in personal happiness and harmony. Personal autonomy that allows for personal heteronomy bolsters the integrity of the individual by allowing him to meet the demands of the Gospel calling for commitment to the other.

In the present marriage canons an attempt has been made to begin to allow for human failure and the possibility for redemption and the feeling and fact of acceptance. They, however, do not go far enough in setting forth the fact of redemption. More persons, it seems to me, would be very willing to admit failure in the face of divorce and seek the Church's healing, if the Church were more willing to be about its business. The very use of the present marriage canons betrays an inner need in the Church to attempt to do its business of healing. In the cases outlined in chapter two one can see that many bishops, fortunately, go outside the limits of the marriage canons to effect the work of the Church. Better canonical directives would allow the Church to implement the personal and direct the social aspects of the marriage relationship.

It has already been noted that many problems of marriage are culminating in divorce on the American scene. One can hardly move about in our society without being directly or indirectly involved in this situation. Literature is full of statistics, and almost every day persons hear how divorce has affected acquaintances and friends. With almost equal frequency one hears of second marriages. There is a vast and complex social problem manifesting itself in the American culture.

The Church is deeply concerned about this and must move to meet the challenge, both the social problem and the challenge of

presenting a redemptive Gospel. That the marriage canons of the Episcopal Church are not in harmony with the customs of our times is true, but the Church should not necessarily allow the society to set standards for the Church to follow. Rather, we in the Church are concerned to study the existing mores of society and meet their challenge if they do not fall within Christian norms. Our task is not to change the finiteness of man but meet his sin with forgiveness. Man's "hope consequently lies in a forgiveness which will overcome not his finiteness but his sin, and a divine omnipotence which will complete his life without destroying its essential nature."⁴

There are those who would still maintain a legalistic approach "but what right has the church to handle these human problems by a purely legal method of procedure, rather than by the pastoral and redemptive one which it is her peculiar function to apply?"⁵ It seems then, that a sound approach, an approach taking into account the good news of redemption of the Gospel and the fact of human failure, is tantamount to being realistic. Not that there is no place for law; there certainly is. The question is, what kind of law? The kind of law needed in the marriage canons is that which will be freedom-producing but one which does not lose sight of the heteronomous conditions ensuing from the Gospel. The Gospel is concerned about the personal that stands in the movement from autonomy to heteronomy. Therein lies the need for canon law and more particularly

for marriage canon law. Canon law in this sense can be the measuring stick for the Gospel in its concern through persons for other persons. It can also test or be a guideline for persons who are involved in divorce and remarriage. A marriage canon that allows the Gospel not just to filter through at random but to present the Gospel in all its power is a marriage canon that will meet persons where they are.

Footnotes - Chapter IV

¹J. H. Oldham, Life Is Commitment (New York: Association Press, 1959), p. 92.

²Ibid., pp. 98, 99.

³Frederick C. Grant, "Marriage: The Gospel and Canon Law," The Churchman, 151:15, (September, 1937), p. 10.

⁴Reinhold Niebuhr, Beyond Tragedy (New York: Charles Scribner's Sons, 1937), p. 306.

⁵Grant, op. cit., p. 13.

the canon. A divorce canon to cover the action of the bishop in this case seems very appropriate. A due process of law is seen in this case but one which seems, for the most part, to reside outside the prescribed limits of the present canons on marriage.

Case Two⁴

A female applicant wants to marry a man whose previous marriage was dissolved by civil court. Both parties are middle-aged and members in good standing. The man was secretly married to a woman about his own age after she had become pregnant. The parents of the two parties learned about the marriage about two weeks after it had taken place. After ten years of marriage in which two children were born, the wife began to leave home for long periods of time until finally the husband stated he would no longer countenance such behavior. This was to no avail since the wife continued leaving home without reason for extended periods of time. The husband finally left her and his home and family. After some eight years, the wife secured an uncontested divorce on grounds of desertion with custody of the children.

Permission was given to the applicant to be married in the Church using, "Marriage is a physical, spiritual, and mystical union of a man and woman, created by their mutual consent of heart, mind, and will thereto, and . . . is in intention lifelong," (Canon 18, section 2b) as the basis for saying that no "marriage bond as the

same is recognized by this Church" now exists, Canon 18, section 2b).

What should the approach be in dealing with this case? In this case does nullity apply, or is there a liberal interpretation of the canons recognizing divorce. The marriage at first seemed to be quite happy, but obviously the wife is the deserter in the prior sense while the husband is the deserter in the ultimate sense. From the facts set forth it would seem that a marriage bond really did exist, but on what does the judgment of the bishop rest? On closer examination of this case one can see that divorce has been recognized by the bishop since the judgment has relied on the intention of lifelong union being the determining factor. The intention was clearly gone from this marriage, and that has been recognized by the bishop in his judgment. There are certainly no impediments that can apply to this case, but equity and mercy seem to be requisite. A divorce canon clear in language and allowing for desertion as a ground for divorce would cover an equitable judgment in this case.

Case Three⁵

A member in good standing wanted to marry a single female Episcopalian but wanted a judgment as to the validity of his first marriage. He gave as grounds alcoholism and adultery, apparently the grounds for the divorce action of the civil court. He stated in a letter, "our marriage was a happy one for some ten years

before my wife became addicted to alcohol and began keeping the company of a male friend." After due inquiry he was given permission to be married by a minister of this Church using Canon 17, section 2b, numbers 4 and 9. These sections refer to insanity and defects of personality respectively.

This was a clear use of the impediments to marriage in order to grant that no marriage bond existed and the proposed marriage could proceed. This is clearly not a case of nullity but simply the recognition of divorce. Should there not be a divorce canon which takes into account alcoholism? I think so, and such a ground for divorce would certainly have covered the pastoral action of this bishop even though he used impediments of nullity to bolster his grant of permission to marry.

Case Four⁶

A divorced Roman Catholic who was married to an Episcopalian sought remarriage to another Episcopalian and wanted a judgment on her former marriage. She became a Roman Catholic at the time of the first marriage.

The applicant claimed that her former husband was not willing to have children but that one child was born and is now in a home because of mental deficiency. The wife stated, "we were quite happy for three years." One child was born, and then the husband refused to have more. The situation finally ended in divorce.

Permission was granted to be married by a minister of this Church although she was not a member, but the judgment applied since the prospective husband is an Episcopalian. Both the former marriage and the proposed marriage were taken into account in this case. The former marriage was found to be null and void since the intention of the former husband was not in accord with the demands of Christian marriage. Impediment number nine, "concurrent contract inconsistent with the contract constituting canonical marriage" was used as a basis for the judgment. It seems quite clear that there was concurrent contract present but the marriage was good for three years. The unwillingness to have children did not manifest itself until the birth of the child, and whether or not the husband had private reservations about having children is not known. It seems safe to say that this marriage should be null and void according to nullity but a recognition of divorce in this case may be nearer the truth. The result needed was certainly received, but it is a matter of interpretation as to whether it comes within the limits of the present marriage canons. Perhaps a ground for divorce could be included in a new canon that would allow for failure to uphold the contract constituting Christian marriage.

Case Five⁷

A young couple who had been schoolmates since grade school and had many common interests were married after a

sufficient dating and engagement period. Apparently neither had been overly affectionate, and he had never made any advances toward her during their dating and courtship. On the wedding night no advance was made on his part and only feeble attempts on subsequent nights. After a short time both made visits to doctors and clergy and finally, at the end of six months, a civil annulment was granted. Apparently the husband had an adolescent attitude toward sex and was judged this way by a psychiatrist. The husband did not contest the suit for annulment and two years later, after due application and attendant circumstances were known, permission was granted for the proposed marriage of the woman and another man.

The facts of this case present a clear-cut case of annulment, and since the civil court decree was annulment, the bishop had clear guidelines to follow in issuing his judgment of permission of marriage. The pertinent question in a case such as this is whether or not a year shall have elapsed from the time of the civil court's decree of annulment until the bishop may concur or not concur with the civil action. The civil action of annulment usually brings with it, and often that of divorce, the right to marry again immediately. In matters of annulment in the Church, it would seem requisite to allow a proposed marriage to take place immediately if the Church were not to follow a strict legalism of a year's lapse of time. On the other hand, pastoral and legal questions arise if the Church is

to allow a possibility for a proposed marriage to take place immediately. If a person is seeking church annulment on a former marriage without an intended spouse in mind, must that person wait at least a year before applying to a bishop after a civil decree of either nullity or divorce has been granted? If there is an intended spouse, must that person wait at least a year after civil decree is final before applying to the bishop? The basic and prior question to these two questions is, are the human factors involved in annulment and divorce really that much different? The fact that a marriage never really started seems to imply a failure of one or the other parties to fulfill the demands of the marriage contract. Annulment implies impediments or failure, in the legal sense, either commensurate with or prior to a marriage whereas divorce implies failure after marriage. There is a distinction between divorce and nullity but a distinction that becomes very nebulous in many cases. Because of the cloudy nature of many cases, the Church should rely heavily on the civil courts, for they have the legal methods and procedures to either test the validity or to examine the breakdown of marriage relationships. The Church, however, must still maintain the right to test civil action against the Christian nature of marriage.

Still the question of time lapse presents a problem. A lapse of time seems, at face value, a wise thing after divorce, but is this the case in annulment? My own feeling is less time is needed in

matters of annulment, basing my opinion on the fact that a marriage is deemed to have never existed as decreed by nullity. That certainly has different legal and pastoral ramifications than divorce. In connection with this, it would seem wise for the Church to accept civil annulment in full faith and credit but not without due examination of particular annulment cases. At the base of this argument is the idea that freedom of a different kind is implied by a civil decree stating that a marriage never existed from a decree of divorce recognizing that freedom has been gained after a measure of stability had been maintained but had fragmented and broken down.

To summarize some of the problems facing the Church regarding its theology of marriage and its canonical directives, we begin with the problem of the interpretation of law. The Protestant Episcopal Church is clearly in the middle in its interpretation of law regarding marriage. Present marriage canons are, for the most part, canons of nullity, but the possibility for the recognition of divorce is also possible. Interpretations towards natural and situational law are implicit and explicit in the canons. Which turn should the Protestant Episcopal Church take, the strict legalistic Western position on marital matters or the Eastern position which might be more feasible for the American culture?

Following this are questions about divorce. Depending on whether or not we accept the Eastern position on marriage and divorce,

how should the Protestant Episcopal Church define its position on divorce? What marriage ceremony should the Church use in cases where divorce has been recognized? Should not the Church be more honest and allow divorced persons to be married in the Church along with re-admission to the fellowship instead of advising marriage in some other church with subsequent re-admission to the fellowship possible after the marriage has taken place?

In matters of nullity what should be the lapse of time before application for church annulment can be made? Should the lapse of time be longer in situations of divorce? The civil courts, of course, would attach some time limit on marriage after divorce but usually none for annulment. The Church, however, should still maintain the right to protect the fellowship by having some time limit to prohibit hasty second marriages.

Does the Church have an effective means to allow members to appeal adverse judgments by bishops? It seems that it does not. Appeal to other bishops may be made, but could there not be a higher court of appeals? Since some judgments by bishops seem to be outside the limits of the canons, should there not be a way of appealing an adverse judgment that may seem to reside outside the limits of the canon? These are but a few of the problems arising in a study of cases in relation to the canons themselves. Suggestions and conclusions to which I have been led will appear later, but now it is necessary to set forth a theology of marriage.

Footnotes - Chapter II

¹Emil Brunner, The Church in the New Social Order (London: SCM Press Ltd., 1952), p. 29.

²Ibid., p. 29.

³Diocesan Case, Diocese Anonymous.

⁴Ibid.

⁵Diocesan Case, Diocese of Massachusetts.

⁶Ibid.

⁷Diocesan Case, Diocese Anonymous.

III

A Theology of Marriage

What is Christian marriage? This question has been present in the Church since its very inception. It is a question with which Jesus was confronted by the religious leaders of his day and time. Indeed, it is a question of the concerned and enlightened Christians of our day. It is deceptively simple for it begs for many answers in many ways. It is a theological question in the most categorical theological sense but a very concrete question in the pastoral theological sense. It is a question that can be thrown into the most mystical and philosophical category without much thought for human personality. It is a question that can limit itself to an area concerned only with human personality and human failure. It can draw a paradox of the most profound sort or draw categorical answers that speak of absolutes without deviation. Thus does the question, "what is Christian marriage?" lead into a possible enigmatic dilemma. What, then, can be said about Christian marriage?

The question of Christian marriage seems to reside in two juxtaposed spheres: one of pure speculative theology and one of humanistic and personality interests. The duty of the Church is to find the middle ground of this polarity on the question of marriage. There are, then, theological interests and consequences of the

human condition to be examined. Indeed, it would seem that nowhere else in theology can a theologized interpretation of human relationship be so far removed from the human condition as can a theology of marriage, and on the other hand, nowhere else can concern for human justice so easily fall into irresponsibility.

On the one side is a strict adhering to a strict legal principle while on the other is, at times, a fatalistic nonchalance about the very particularized human relationship of marriage. Since the Church purports to be concerned not only with a theology of marriage but also with persons in relationship, then the Church must find a solution firmly based in the good news of the Gospel. A theology of marriage needs to be set forth containing sympathetic attitudes towards a strictly theological interpretation of marriage and, at the same time, a concern for the complex issue of personal relationships.

"Christian Marriage begins, then, not with a system of ethics, but with faith - faith in the existence of God, confidence in God's attributes, assurance of the manifestation of God in Jesus Christ."¹ What is called for as the basis of Christian Marriage is theological in nature and speaks of commitment to God in Jesus Christ. Here is safe theological ground. The "what" of marriage is basically relationship, but in the Christian sense, relationship grounded in faith in Jesus Christ. The "stuff" of Christian marriage

is based squarely in commitment to God, but usually a strict theology of marriage which does not take into account the phenomenology of behavior and ontological factors represents only a tenuous Christian Ideal. "As we see it, the faith that there is Another who cares, cares in a degree and manner that no human being can adequately understand, is psychologically continuous with the yearning that one's deepest values find at least another sponsor in the world."² When a theology of marriage does not take into account the ontological factors of values, marriage can only be seen in terms of the relationship of Christ and His Church or possibly the sociality of the Godhead. To be sure, it is essential to have theological elements coupled with a personal faith and commitment to God in a theology of marriage, but without sound views as to the nature of reality, a theology of marriage is dead.

A strictly phenomenological theology of marriage can only speak of sterile permanence. Marriage becomes a matter of static legality where relationship is, at best, only mechanical.

"The Christian teaching about marriage is distorted when the sanctity of marriage is identified only with permanence. A couple do not uphold the sanctity of marriage by remaining man and wife, when their relationship to each other frustrates every purpose for which marriage was given."³ A theology of marriage speaking only of permanence in an analogous manner to that of Christ and

His Church or using the category of God's intention via Scripture and tradition is not the Christian Ideal at all. Rather, it is a mechanistic use of natural law betraying a shallow deism. Certainly, it is theologically sound to speak of God's intention in matters of relationship, but it is only one side of the question of the Christian Ideal. "It is a matter of real urgency that the Church should not be committed to a discipline in marriage which does not give as clear a witness to Christ's Redemption as it does to His standard of marriage."⁴ My contention is that Ideal, in the Christian sense, sets forth the good news of the Gospel that clearly states a demand but accepts the faint-hearted. This is a matter of record in the history of the Church, at least generally speaking, except in the area of the particularized relationship of Christian marriage. The path that the Church seems to have followed is threefold on this matter of permanence and the "real what" of marriage. Part of the Church has followed to the letter the categorical and mechanistic attitude on marriage while another part has followed the liberalizing influence of pan-Protestantism with an emphasis on the pastoral side of the issue. A third segment of the Church has remained ambiguous and ambivalent in attempts to correlate a mechanistic natural law with the demands of redemptive action. In my estimation all three avenues leave much to be desired, let alone to be changed.

The effect of the first avenue of attitude leaves marriage in the realm of the phenomenological and is based primarily in a natural law interested only in the maintenance of the social institution itself. This, I would take to be demonic or at least sub-Christian. It seems to speak only of justice, which humanly speaking is unjust, and nothing of mercy and love.

The effect of the second avenue of attitude leaves marriage open to a nonchalant, fatalistic irresponsibility. That part of the Church under the influence of pan-Protestantism seems to follow the pattern of an open-ended acceptance of divorce and remarriage. In this approach it cannot always be pleaded that redemptive action is the foremost and obvious conclusion in which the Church is participating. Simply because certain churches are willing to bless a "fresh start" does not mean that there has been sufficient witness to the fact of Redemption, for possibility for such redemption can only come when persons are aware of failure. This is not to minimize the fact that divorced persons normally feel a sense of failure, but the intention of the "fresh start" needs to be bolstered by the fact of Redemption and acceptance and the seriously renewed intention for the way things ought to be.

The effect of the third avenue of attitude betrays an ambiguous, pragmatic approach which seems to be particularly true of the Protestant Episcopal Church. Ways of annulment and divorce and

remarriage are possible under certain circumstances, but the language expressing these possibilities is unclear and only seems to show a paucity of sound theology of marriage. The ambiguity of attitude towards marriage appears to stem from an attempted cor- relation of the dictum of the "once for all" nature of marriage with an allowance for the fact of human failure. Seemingly, neither ideas of permanence nor those of redemptive action are served by this ambiguity. For many laymen problems of the either-or type are raised when he sees the discrepancy between the statements and the actions of the Church. The Marriage Canons present such problems in the Episcopal Church, and I will deal with them later.

For the meanwhile, however, I am concerned with a theology of marriage able to set forth a middle ground on which a sound theology of marriage and the fact of human failure can be brought to terms with one another.

Middle ground in a theology of marriage should be sought in areas involving intention and growth. I am not so much concerned with strict legal principle as with intention. I do not agree that reliance on a strictly legalistic theological principle ensures stability in matters of marriage unless we are primarily concerned with the institution of marriage and not the persons within the married relationship. Rather, the moral principle of risk is a better approach to the marriage relationship. It should be recognized that in any

relationship risk is entailed, and especially in marriage. Relying on a "crutch" legal principle is no more safe than being thrust into a relationship where risk is the major factor. This I would take to be particularly true of marriage. If we grant that marriage is in fact indissoluble and must remain intact no matter what, the assurance that there will be proper growth and rapport does not necessarily have to be also in fact. On the other hand, if we grant that in risk and intention, growth and rapport rests entirely on the individuals and thereby the fact and state of their marriage, then we must add that marriage can break down regardless of the strict legal principle. My whole "blik" rests on the oughtness of marriage intentions. It is one thing to say this is the way it is and another to say this is the way it ought to be.

"Unfortunately it is around this matter of intention that there is so much confusion today."⁵ If we could begin to develop a theology of marriage taking seriously this matter of intention, we could begin to throw the responsibility onto persons rather than onto moralistic principles. The dictum of once for all indissolubility is a moralism of the most negative kind. It propounds a blatant un-Christian contract. Nowhere else in theology do we think of contract except in matters of marriage. Marriage is a matter of covenant and not only contract since covenant is in the nature of the will. Marriage is in covenant, a promise that growth and deepening rapport between

persons can take place. For "marriage is the marriage of persons and a venture in the growth of persons."⁶

But "since marriage is a covenant and not merely contract, the problem is also how this faithfulness fits into the broader Covenant of God - how this marriage manifests trust in the promises of God."⁷ Christian marriage is that marriage which manifests an attempt to express a relationship to and under God. A climate of growth must be provided so that the persons involved can be themselves and allow one another to come to a fuller personhood. Intention and oughtness of the marriage relationship is taken into account in this approach. When this part, and other parts, of the basic intention of marriage breaks down, the marriage no longer exists. In a marriage where growth and rapport become non-existent, the principle of indissolubility may remain intact, but what kind of relationship is it to which that indissolubility attests? But some will say, if marriage is not based on the strict legal principle of indissolubility, then does that not make it easy for persons to leave or enter as they please? The answer is both yes and no - yes for those who have no feeling for the way things ought to be or for those who do not take commitment to another person seriously; no for those who fully realize the implications of the personal responsibility of commitment in marriage and for those who recognize that the well-being of their marriage rests on mutual love and commitment.

Thus far in a theology of marriage, elements of intention, covenant, and growth are seen, but these are the resultant elements in marriage stemming from a more basic element - love. Unfortunately, the word love can connote many meanings at once, and upon this word rests much confusion today. Many perceptions of love are presented by our western culture, especially in the United States. There is the Hollywood brand of love - or the romantic type, and the love that speaks only of sensuality. There is the "puppy love" variety between adolescents. There is the love for ideals and country and parental love, spoken of in the context of the family. And there is what is commonly called married love. Love, indeed, is a very comprehensive word but nonetheless ambiguous. Even so, it is love that is the very basis of the marriage relationship. "In this personal relationship permanence and exclusiveness are implicit, and no one enters upon it without feeling this. They are not conventional limitations imposed upon love. They are the inevitable expressions of love. There is no such thing as free love; love is the most binding thing on earth, or it is not love at all."⁸

In Christian marriage love is the binding element. It is not free as though one chooses it as an object but but binding because it involves commitment. Yet love in commitment is freedom-producing. One becomes a part of the other person but also faces up to what it is to be oneself. Love is that binding element in

Revised Marriage Canons

In an earlier chapter I outlined some of the areas in which revision is needed. We have also seen the wide range of problems connected with marriage and the need for better canonical directives.

That the marriage canons are ambiguous is clear, and two varying sets of theologies of marriage can be read from the existing canons.

It is not only clear the canons are ambiguous at various points but that the ambiguities point to the fact that both nullity and divorce are recognized by the Protestant Episcopal Church. Underlying this recognition of both nullity and divorce are two different theologies of marriage. One is able to glean from the ambiguities both the recognition of divorce and nullity and their correspondent theologies.

If this be the case, then a canon on divorce would seem to be most appropriate. Bishops would still need not do violence to their consciences if they were to simply follow a clearer canon on nullity while ignoring a canon on divorce. Indeed, even now this is the case although there is no clear canon on divorce. In other instances bishops give judgments that are "church divorces."

Some of the internal problems of the marriage canons begin with Canon 17, section 6. This section covers both minister and member of the Church in regard to remarriage. Section 6 reads thus: "no minister of this Church shall solemnize the marriage

of any person who has been the husband or wife of any other person then living whose marriage has been annulled or dissolved by the civil court, except as hereinafter in these Canons provided; nor shall any member of this Church enter upon marriage when either of the contracting parties has been the husband or wife of any other person then living whose marriage has been annulled or dissolved by civil court, except as hereinafter in these Canons provided." Problems arise in the interpretation of annulled and dissolved. A strict interpretation in the context of the total canon would hold that nullity is meant by the word dissolved. This interpretation looks ahead in the canons to Canon 18, section 2b where the impediments of Canon 17, 2b can be properly used where civil action has dissolved a marriage. But dissolved, according to a strict interpretation, must apply to nullity. Thus, the combination of Canon 18, 2b and Canon 17, 2b refer only to cases of annulment. But "legal authorities who take the liberal view of the canon hold that the words 'annulled' and 'dissolved' apply to different types of cases."¹

The above problem becomes extended when the clause, "are shown to exist or to have existed which manifestly establish that no marriage bond as the same is recognized by this Church exists," is coupled with Canon 17, 2b following the procedure of Canon 18, 2b. What is really implied? A case could be made that only nullity is meant since dissolved means nullity and that the above procedural

clause refers to nullity. However, it is the "to exist or to have existed" clause in Canon 18 that is used by liberal bishops when clear civil divorce dissolutions come before them. With an interpretation of the word dissolved meaning divorce coupled with the impediments of Canon 17, a case for divorce can be seen. An even more liberal interpretation of the word dissolved is possible "Since the impediments given in Canon 17 apply to annulment proceedings, provided such impediments existed at the time when the marriage was solemnized, the term 'dissolved' would appear to mean that the Church can remarry persons whose previous marriage was terminated for reasons other than those listed in Canon 17."²

I have pinpointed perhaps the major internal problem in the marriage canons, but as noted before, there are other areas in need of revision. My proposed revision will take these areas into consideration. It will be a set of proposed canons on marriage attempting to incorporate clearer language, a shorter time limit of marriage after annulment, and a system of appeal beyond the individual bishop. The proposed new revision will also include a canon of divorce and a clearer canon of nullity. If it has not already been made apparent, I am proposing a more liberal canon on marriage tantamount to my theology of marriage.

Explanation of the Revised Marriage Canons

The Canon called "Of the Solemnization of Holy Matrimony" is essentially the same as the present Canon 17. Changes, however, occur in the list of impediments. In the present Canon 17 mistaken identity is stated in impediment 2 and repeated in impediment 9. Impediment 9 uses the word "error" whereas impediment 2 uses the word "mistake" as to the identity of either party. I have combined mistake and error in impediment 2 in the revision. The remainder of impediment 9 of the present Canon appears as impediment 5 in the revision. Impediment 8 of the present Canon needed to be clearer in language so that impediment 9 of the revision clarifies that concurrent contract may apply to both parties in mutual consent or one party alone.

The Canon called "Of Regulations Respecting Nullity and Divorce" has some considerable changes from Canon 18. Section 1 of the revision includes persons who are desirous of being members of this Church under the aegis of marital judgments. Section 2 of the revision is section 7 (c) of Canon 16 of the present Canon, but since divorce is implied in the nature of the language, I felt it should be included in the marriage canons proper. Section 3 (a) of the revision simply allows less time for civil annulment to be brought before the bishop for judgment in the eyes of the Church.

Section 3 (b) of the revision is in regard to nullity and repeats much of section 3 (b) of the present canons except that this section of the revision deals with annulment only. The impediments of Canon 17, section 2, Clause (b) or the same of the revised "Of the Solemnization of Holy Matrimony" must be shown to have existed at the time the marriage was contracted. This section applies only to nullity.

Section 3 (c) of the revision is a clear section on divorce and is a delineation of divorce judgment possibilities that are tacit in Canon 18, section 2 (b) of the present canons. Court records are deemed usable as an aid to the bishop and the marriage court. Reliance on the civil authorities in matters of divorce is of utmost importance, but the Church must still maintain the right to measure court decrees against its own concepts of justice and equity in marital matters. Although court decrees which outline grounds for divorce may be used by the bishop, I have included four clearly stated grounds for divorce.

Section 3 (d) embodies a declaration of repentance referring to a previous marriage and intention referring to the proposed marriage which constitutes a second marriage. It is a complementary declaration to the declaration of intention found in Canon 17 of the present canons.

Section 3 (e) of the revision simply refers to judgments of Provincial nature to be made in writing and a matter of permanent record. This looks ahead to the Clause (f) which refers to appeal in case of unfavorable diocesan judgments.

Changes or additions are underlined in the revision. Both the revised canons and the present canons appear in Appendices A and B respectively.

APPENDIX A

A Proposed Revision

Of The Solemnization of Holy Matrimony

Section 1. Every Minister of this Church shall conform to the laws of the State governing the creation of the civil status of marriage, and also to the laws of this Church governing the solemnization of Holy Matrimony.

Section 2. No Minister of this Church shall solemnize any marriage unless the following conditions are complied with:

- (a). He shall have ascertained the right of the parties to contract a marriage according to the laws of the State.
- (b). He shall have ascertained the right of the parties to contract a marriage according to the laws of this Church, and not in violation of the following impediments:
 - (1). Consanguinity (whether of the whole or of the half blood) within the following degrees:
 - (a). One may not marry one's ascendant or descendant.
 - (b). One may not marry one's sister.
 - (c). One may not marry the sister or brother of one's ascendant or the descendant of one's brother or sister.
 - (2). Mistake or error as to the identity of either party.
 - (3). Mental deficiency of either party sufficient to prevent the exercise of intelligent choice.
 - (4). Insanity of either party.
 - (5). Fraud, coercion, duress, or such defects of personality as to make competent or free consent impossible.
 - (6). Failure of either party to have reached the age of puberty.
 - (7). Impotence, sexual perversion, or the existence of venereal disease in either party undisclosed to the other.
 - (8). Facts which would make the proposed marriage bigamous.

- (9). Concurrent contract, by mutual consent or by one party alone, inconsistent with the contract constituting canonical marriage.
- (c). He shall have ascertained that at least one of the parties has received Holy Baptism.
- (d). He shall have instructed the parties as to the nature of Holy Matrimony.
- (e). The intention of the parties to contract a marriage shall have been signified to the Minister at least three days before the service of solemnization; Provided, that for weighty cause, the Minister may dispense with this requirement, if one of the parties is a member of his Congregation, or can furnish satisfactory evidence of his responsibility. In case the three day's notice is waived, the Minister shall report his action in writing to the Ecclesiastical Authority immediately.
- (f). There shall be present at least two witnesses to the solemnization of the marriage.
- (g). The Minister shall record in the proper register the date and place of the marriage, the names of the parties and their parents, the age of the parties, their residences, and their Church status, and the witnesses and the Minister shall sign the record.

Section 3. The Minister shall have required that the parties sign the following declaration:

"We, A. B. and C. D., desiring to receive the blessing of Holy Matrimony in the Church, do solemnly declare that we hold marriage to be a lifelong union of husband and wife as it is set forth in the Form of Solemnization of Holy Matrimony in the Book of Common Prayer. We believe it is for the purpose of mutual fellowship, encouragement, and understanding, for the procreation (if it may be) of children, and their physical and spiritual nurture, for the safeguarding and benefit of society. And we do engage ourselves, so far as in us lies, to make our utmost effort to establish this relationship and to seek God's help thereto."

Section 4. It shall be within the discretion of any Minister of this Church to decline to solemnize any marriage.

Section 5. No Minister of this Church shall solemnize any marriage except in accordance with these Canons.

Section 6. No Minister of this Church shall solemnize the marriage of any person who has been the husband or wife of any other person then living whose marriage has been annulled or dissolved by the civil court, except as hereinafter in these Canons provided; nor shall any member of this Church enter upon a marriage when either of the contracting parties has been the husband or the wife of any other person then living whose marriage has been annulled or dissolved by a civil court, except as hereinafter in these Canons provided.

Of Regulations Respecting Nullity and Divorce

Section 1. The provisions of this Canon shall apply only to active members of this Church in good standing; provided, however, that in certain cases persons who are desirous of being members of this Church shall be treated as members in good standing.

Section 2. When marital unity is imperilled by dissension, it shall be the duty of either or both parties, before contemplating legal action, to lay the matter before a Minister of the Church; and it shall be the duty of such Minister to labor that the parties may be reconciled.

Section 3. (a). Any person, being a member of this Church in good standing, or any person desirous of being a member of this Church, whose marriage has been annulled or dissolved by a civil court of competent jurisdiction may apply to the Bishop or Ecclesiastical Authority of the Diocese or Missionary District in which such person is canonically resident for a judgment as to his or her marital status in the eyes of the Church. And any person, being a member of this Church in good standing, or desirous of being a member of this Church, who has been annulled or dissolved by a civil court of competent jurisdiction may apply to the Bishop or Ecclesiastical Authority of the Diocese or Missionary District in which he or she is canonically resident, for permission to be married by a Minister of this Church. Provided in both instances, that in the case of civil annulment at least three months

shall have elapsed from the date that the civil decree became final and in the case of civil divorce that at least one year shall have elapsed from the date that the civil decree became final. Such application should be made at least thirty days before a contemplated marriage.

- (b). When such application respecting annulment is made to the Ecclesiastical Authority and when any of the impediments set forth in Canon 17, section 2, Clause (b) are shown to have existed at the time the marriage was contracted which manifestly establish that no marriage bond as the same is recognized by this Church exists, the same may be declared by proper authority, if the Bishop or Ecclesiastical Authority is satisfied that the parties intend a true Christian marriage. The Bishop or Ecclesiastical Authority shall have referred the application to the Diocesan Marriage Court which shall have been instituted by diocesan action. The Bishop or Ecclesiastical Authority shall take care that his or its judgment is based upon and conforms to the doctrine of this Church, that marriage is a physical, spiritual, and mystical union of a man and woman created by their mutual consent of heart, mind, and will thereto, and is a Holy Estate instituted of God and is in intention lifelong. Any such judgment shall not be construed as reflecting in any way upon the legitimacy of children or the civil validity of the former relationship.
- (c). When such application respecting divorce is made to the Ecclesiastical Authority and when any of the conditions arising after marriage, as set forth in this Canons, are shown to have arisen after the marriage was contracted or exist at the present, which manifestly establish that no marriage bond as the same is recognized by this Church exists, the same may be declared by proper authority, if the Bishop or Ecclesiastical Authority is satisfied that the parties intend a true Christian marriage. Any such civil court decrees which outline grounds for divorce that can be deemed just and true by the Bishop or Ecclesiastical Authority, upon the advice of the Diocesan Marriage Court, may be used in seeking equitable judgment; especially such conditions as:
- (1). Desertion.
 - (2). Insanity manifesting itself after marriage.

- (3). Sexual perversion arising after marriage.
- (4). Character disorders arising after marriage including alcoholism.

- (d). The Minister shall have required that the divorced party or parties who are seeking marital judgment from the Bishop or Ecclesiastical Authority sign the following declaration:

"I, A. B., desiring to receive the blessing of Holy Matrimony in the Church, do so, recognizing that my previous marriage did not conform to the Christian standard of marriage for which I am truly repentant. I do now engage myself to the end that my proposed marriage with C. D. will uphold the Christian ideal of marriage as set forth by the teaching of this Church, that it is for the purpose of mutual fellowship, encouragement, and understanding, for the procreation of children (if it may be), and their physical and spiritual nurture, for the safeguarding and benefit of society. And I do engage myself, so far as in me lies, to make the utmost effort to establish this relationship and seek God's help thereto."

- (e). Every judgment rendered under this Canon shall be in writing and shall be made a matter of permanent record in the Archives of the Diocese or Missionary District. Every marital judgment rendered on the Provincial level shall be in writing and shall be made a matter of permanent record in the Synodical Archives.

- (f). Any person in whose favor a judgment has been granted under the provisions of this Canon may be married by a Minister of this Church; Provided, that if the marriage is proposed to be solemnized in another jurisdiction than the one in which said judgment has been granted, the said judgment shall have previously been submitted to and approved by the Ecclesiastical Authority of that jurisdiction. If the previous judgment is not concurred with by the Ecclesiastical Authority of that jurisdiction, application may be made to the Provincial Court of Appeals for further judgment.

APPENDIX B

**The Present Marriage Canons of the
Episcopal Church**

Canon 17 Of the Solemnization of Holy Matrimony

Section 1. Every Minister of this Church shall conform to the laws of the State governing the creation of the civil status of marriage, and also to the laws of this Church governing the solemnization of Holy Matrimony.

Section 2. No Minister of this Church shall solemnize any marriage unless the following conditions are complied with:

- (a). He shall have ascertained the right of the parties to contract a marriage according to the laws of the State.
- (b). He shall have ascertained the right of the parties to contract a marriage according to the laws of this Church, and not in violation of the following impediments:
 - (1). Consanguinity (whether of the whole or of the half blood) within the following degrees:
 - (a). One may not marry one's ascendant or descendant.
 - (b). One may not marry one's sister.
 - (c). One may not marry the sister or brother of one's ascendant or the descendant of one's brother or sister.
 - (2). Mistake as to the identity of either party.
 - (3). Mental deficiency of either party sufficient to prevent the exercise of intelligent choice.
 - (4). Insanity of either party.
 - (5). Failure of either party to have reached the age of puberty.
 - (6). Impotence, sexual perversion, or the existence of venereal disease in either party undisclosed to the other.
 - (7). Facts which would make the proposed marriage bigamous.
 - (8). Concurrent contract inconsistent with the contract constituting a canonical marriage.
 - (9). Attendant conditions: error as to the identity of either party, fraud, coercion or duress, or such

defects of personality as to make competent or
free consent impossible.

- (c). He shall have ascertained that at least one of the parties has received Holy Baptism.
- (d). He shall have instructed the parties as to the nature of Holy Matrimony.
- (e). The intention of the parties to contract a marriage shall have been signified to the Minister at least three days before the service of solemnization; Provided, that for weighty cause, the Minister may dispense with this requirement, if one of the parties is a member of his Congregation, or can furnish satisfactory evidence of his responsibility. In case the three day's notice is waived, the Minister shall report his action in writing to the Ecclesiastical Authority immediately.
- (f). There shall be present at least two witnesses to the solemnization of the marriage.
- (g). The Minister shall record in the proper register the date and place of the marriage, the names of the parties and their parents, the age of the parties, their residences, and their Church status, and the witnesses and the Minister shall sign the record.

Section 3. The Minister shall have required that the parties sign the following declaration:

"We, A. B. and C. D., desiring to receive the blessing of Holy Matrimony in the Church, do solemnly declare that we hold marriage to be a lifelong union of husband and wife as it is set forth in the Form of Solemnization of Holy Matrimony in the Book of Common Prayer. We believe it is for the purpose of mutual fellowship, encouragement, and understanding, for the procreation (if it may be) of children, and their physical and spiritual nurture, for the safeguarding and benefit of society. And we do engage ourselves, so far as in us lies, to make our utmost effort to establish this relationship and to seek God's help thereto."

Section 4. It shall be within the discretion of any Minister of this Church to decline to solemnize any marriage.

Section 5. No Minister of this Church shall solemnize any marriage except in accordance with these Canons.

Section 6. No Minister of this Church shall solemnize the marriage of any person who has been the husband or wife of any other person then living whose marriage has been annulled or dissolved by the civil court, except as herein-after in these Canons provided; nor shall any member of this Church enter upon a marriage when either of the contracting parties has been the husband or the wife of any other person then living whose marriage has been annulled or dissolved by a civil court, except as herein-after in these Canons provided.

Canon 18 Of Regulations Respecting Holy Matrimony

Section 1. The provisions of this Canon shall apply only to an active member of this Church in good standing.

Section 2. (a). Any person, being a member of this Church in good standing, whose marriage has been annulled or dissolved by a civil court of competent jurisdiction may apply to the Bishop or Ecclesiastical Authority of the Diocese or Missionary District in which such person is canonically resident for a judgment as to his or her marital status in the eyes of the Church. And any person, being a member of this Church in good standing, who desires to marry a non-member of this Church whose previous marriage has been dissolved or annulled by a civil court of competent jurisdiction may apply to the Bishop or Ecclesiastical Authority of the Diocese or Missionary District in which he or she is canonically resident, for permission to be married by a Minister of this Church, provided in both cases that the judgment of the Civil court has been final and that at least one year shall have elapsed from the date that the decree became final. Such application should be made at least thirty days before a contemplated marriage.

(b). If the Bishop or Ecclesiastical Authority is satisfied that the parties intend a true Christian marriage he may refer the application to his Council of Advisors, or to the Court if such has been established by diocesan action. The Bishop or Ecclesiastical Authority shall take care that his or its judgment is based upon

and conforms to the doctrine of this Church, that marriage is a physical, spiritual, and mystical union of a man and woman created by their mutual consent of heart, mind, and will thereto, and is a Holy Estate instituted of God and is in intention lifelong; but when any of the facts set forth in Canon 17, section 2, Clause (b), are shown to exist or to have existed which manifestly establish that no marriage bond as the same is recognized by this Church exists, the same may be declared by proper authority. No such judgment shall be construed as reflecting in any way upon the legitimacy of children or the civil validity of the former relationship.

- (c). Every judgment rendered under this Canon shall be in writing and shall be made a matter of permanent record in the Archives of the Diocese or Missionary District.
- (d). Any person in whose favor a judgment has been granted under the provisions of this canon may be married by a Minister of this Church; Provided, that if the marriage is proposed to be solemnized in another jurisdiction than the one in which said judgment has been granted, the said judgment shall have previously been submitted to and approved by the Ecclesiastical Authority of that jurisdiction.

Conclusion

It should now be clear that a revision of the present marriage canons of the Protestant Episcopal Church is needed.

Along with this revision, the Church should set forth a theology of marriage that will speak to the twentieth century. I have attempted to show reasons why reform is needed from historical, theological, and canonical law studies. Contiguous with these broad categories are cultural, social, and psychological interests that bring my concern to the particular individual who lives in the twentieth century. The Church's task of setting standards, even to the setting of standards respecting redemption, while being redemptive at the same time is paramount. Hopefully, the historical setting provided a basis from which to launch into an examination of both persons with marital problems and the Church in dealing with those problems. A theology of marriage as an outcome of the examination of the historical setting and the problems before us seemed indispensable. The marriage canons themselves, under the general aegis of canon law, were also measured against the Gospel, and only after all these various categories were seen as an integrated whole could any revision be set forth.

Other general conclusions come from this study. Better education of the laity respecting the Christian nature of marriage is

needed in the Church. Recognition of divorce as an appropriate means to help individuals face the fact of broken marriage relationships, along with a redemptive acceptance and possibility for re-marriage of those involved would begin to meet twentieth century social conditions. And finally, there should be recognition that canon law can be an effective means to guide the Church in its attempt to live the Gospel.

Footnotes - Chapter V

¹ Robert Hatch, "Ambiguities In The Marriage Canon," Anglican Theological Review, 31:1, (January, 1949), p. 18.

² Ibid., p. 18.

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